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No. 06-1082

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

JOINT APPENDIX

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IN THE SUPREME COURT OF VIRGINIA

Case No. 052619

DAVID LEE MOORE,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
12/21/05	Petition for Appeal Received
01/17/06	Brief in Opposition Received
03/13/06	Record Received
05/31/06	Certificate of Appeal
05/31/06	Disposition ORDER granting Petition for Appeal
07/07/06	Opening Brief Received
07/07/06	Appendix Received
07/31/06	Appellee Brief Received
08/14/06	Reply Brief Received
11/03/06	Opinion issued REVERSING and entering final judgment

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IN THE COURT OF APPEALS OF VIRGINIA

Case No. 2648-03-1

DAVID LEE MOORE,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
10/14/03	Copy of Notice of Appeal
01/05/04	Record Received
03/04/04	Brief in Opposition Received
03/24/04	Petition for Appeal
04/14/04	ORDER GRANTING Appeal
05/14/04	Certificate of Appeal
05/27/04	Appellant's Designation
06/09/04	Appellee's Designation
06/22/04	Opening Brief Received
06/22/04	Appendix Received
07/19/04	Appellee Brief Received
08/02/04	Reply Brief Received

02/22/05	Disposition: REVERSED and FINAL JUDGMENT
03/08/05	Petition for Rehearing
03/22/05	Petition for Rehearing EN BANC – GRANTED
12/21/05	Notice of Appeal to the Supreme Court of Virginia

IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH

Case No. 03-0611

COMMONWEALTH OF VIRGINIA,

V.

DAVID LEE MOORE,

DEFENDANT.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
03/26/03	Motion to Suppress
04/03/03	Grand Jury Indictment
07/23/03	Trial
07/25/03	FELONY ORDER – Motion to Strike is Overruled; defendant is found GUILTY and is referred for a pre-sentence investigation and report
10/10/03	SENTENCING ORDER
11/03/03	Transcript of July 23, 2003 filed

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA	:	INDICTMENT
v.	:	NO. 03-611
David Lee Moore,	:	
Defendant	:	

MOTION AND NOTICE
PURSUANT TO SECTION 19.2-266.2

COMES NOW the defendant, by counsel and filed this Motion and Notice, pursuant to Section 19.2-266.2 of the Code of Virginia, 1950, as amended, and affirmatively makes his motion to suppress all evidence seized as incident to or as basis for his arrest and/or seized as incident to a search warrant on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth, or Sixth Amendments to the Constitution of the United States, or Article I, Section 8, 10, or 11 of the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self-incrimination, and further states that this Motion and Notice is filed not later than seven (7) days prior to trial.

David Lee Moore,

By /s/ Amy Chudzinski
Of Counsel

Amy Chudzinski
Assistant Public Defender
600 Dinwiddie Street
Portsmouth, Virginia 23704

CERTIFICATE

I certify that a true copy of the foregoing Motion and Notice was delivered this 26th day of March, 2003 to Ali Sprinkle, Assistant Commonwealth's Attorney, First Union Bank Building, 430 Crawford Street, 3rd Floor, Portsmouth, Virginia 23704.

/s/ Amy Chudzinski

COMMONWEALTH OF VIRGINIA

[SEAL]

Virginia:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

Grand Jury Indictment

The Commonwealth of Virginia **Plaintiff** **v.** **DAVID L. MOORE** **Defendant**	**Manufacture, Sale, or Distribution of Cocaine, a Schedule II Controlled Substance, or Possession with Intent to Manufacture, Distribute or Sell Cocaine, a Schedule II Controlled Substance** **03-0611**

THE GRAND JURORS OF THE COMMONWEALTH OF VIRGINIA, in and for the body of the City of Portsmouth, and now attending the said Court, upon their oaths, present that, in the City of Portsmouth, the accused,

DAVID L. MOORE

1. **Manufacture, Sale, or Distribution of Cocaine, a Schedule II Controlled Substance, or Possession with Intent to Manufacture, Distribute or Sell Cocaine, a Schedule II Controlled Substance**

On or about Thursday, February 20, 2003, did manufacture, sell, give, distribute or possess with

intent to manufacture, sell, give or distribute Cocaine, a controlled substance listed in Schedule II of the Drug Control Act, in violation of §§18.2-248; 54.1-3446 through 54.1-3452; 18.2-10 of the Code of Virginia (1950) as amended.

G J
WITNESS: Sgt. Donald K. Butler **A TRUE BILL** ✓

CGJ: 03/13/2003 **NOT A TRUE BILL** _

GRAND JURY: 04/03/2003

/s/ Garland C. Butler
Foreman of the Grand Jury

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA	:	
	:	INDICTMENT
Vs.	:	NO. 03-0611
DAVID LEE MOORE	:	

TRANSCRIPT

Following is stenographic transcript of the proceedings in the above-entitled case, in said court, on the 23rd day of July, 2003, before the Honorable Mark S. Davis, Judge of the Circuit Court of the City of Portsmouth, Virginia.

APPEARANCES: ALI T. SPRINKLE,
Attorney for the Commonwealth.

AMY CHUDZINSKI,
Counsel for the Defendant.

(Court reporter sworn.)

FAYE B. CHAPMAN, COURT REPORTER

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[8] Detective Karpowski.

THE COURT: Do you want to give me any kind of opening on your motion to suppress at all?

All right, go –

MS. CHUDZINSKI: I guess I don't understand –

THE COURT: All right. Go ahead.

DETECTIVE B. J. KARPOWSKI, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CHUDZINSKI:

Q Detective, going back to February 20, you radioed to other detectives regarding David Moore, is that correct?

A Yes and no.

Q Okay. When you radioed to Detective Anthony, did you tell him to pull over somebody named Chubs?

A There was a discussion going on over the [9] radio about an individual that was driving a car and the nickname Chub was mentioned. I radioed back that I had checked Chub's driver's license status the week before and that he was, in fact, suspended.

The vehicle was stopped and Mr. Moore was the driver. However, when I passed by, he was not the Chub I was referring to. I was referring to Christopher Delbridge.

Q Okay. So did you see Christopher Delbridge driving or –

A The week prior, yes, ma'am, but not on this particular date. When they said the nickname Chub, I was thinking in my mind Christopher Delbridge and

I informed them that that Chub's license was suspended, and then when I rode past the traffic stop and I saw Mr. Moore in custody, that was not the Chub that I had checked his license the week before.

MS. CHUDZINSKI: Okay. I don't have any further questions of this witness.

THE COURT: Okay. Miss Sprinkle?

CROSS EXAMINATION

BY MS. SPRINKLE:

Q You got information from them that they saw Chubs, is that right?

A Yes, ma'am.

[10] Q Okay. So then you then told them that you knew that Chubs had a suspended license?

A Yes, ma'am.

Q And it wasn't until after they were stopped that you realized it was not the same person you had thought?

A That's correct.

MS. SPRINKLE: Nothing further, Judge.

THE COURT: Is Christopher Delbridge, he has a street name, a nickname of Chub?

THE WITNESS: Chubs, yes, sir. He had just gotten out of the federal penitentiary probably a

month before and I had seen him, had correspondence with him and I'd seen him driving the week prior; that's why I checked his driver's license status.

THE COURT: And so you got some kind of radio communication going back and Detective Anthony on the channel – Well, you heard someone mention that they had seen Chubs and you thought that it was Christopher Delbridge?

THE WITNESS: That's correct.

THE COURT: And you radioed back to them, "Stop him because I know that he's –"

THE WITNESS: That's correct.

THE COURT: " – got a suspended [11] license."

THE WITNESS: Yes, sir.

THE COURT: You later drove by the scene and realized that it was not Christopher Delbridge?

THE WITNESS: That's correct.

THE COURT: Did you know of anybody else who has a street name or nickname of Chubs?

THE WITNESS: No, sir.

THE COURT: At the time?

THE WITNESS: No, sir, I did not.

THE COURT: Okay. Thank you. Any other questions that I have raised for you all?

MS. SPRINKLE: No, sir, Judge.

MS. CHUDZINSKI: No, sir.

THE COURT: All right. Thank you, Detective.

(Witness excused.)

MS. CHUDZINSKI: I'm going to call Detective Anthony.

---

[12] *DETECTIVE MARK ANTHONY*, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CHUDZINSKI:

Q Detective Anthony, did you issue a traffic stop of Mr. David Lee Moore on February 20?

A Myself and Detective McAndrew issued a traffic stop.

Q Okay. And why did you stop Mr. Moore for a traffic stop?

A Based on information I received over the radio from Detective Karpowski that the person who

was driving the car who I knew as Chubs driver's license was suspended.

Q Okay. So you knew Mr. Moore as Chubs?

A Yes.

Q Okay. And when you pulled Mr. Moore over, you did determine that his license was suspended, is that correct?

A We ultimately determined that, that's correct.

Q Okay. Did you issue him a summons for a suspended license?

[13] A No, we effected an arrest.

Q Why did you choose to arrest him?

A Just our prerogative, we chose to effect an arrest. Additionally, subsequent to the traffic stop, narcotics were eventually recovered.

Q But why didn't you just issue him a summons?

A Well, we were still in the middle of the investigation; the investigation was not complete yet. We were, pursuant to the traffic stop, we were also conducting a narcotics investigation.

Q Okay. When you pulled him over, were there any drugs in plain view?

A No.

MS. CHUDZINSKI: Okay. I don't have any further questions.

MS. SPRINKLE: I have a couple, Judge.

CROSS EXAMINATION

BY MS. SPRINKLE:

Q You never told Detective Karpowski that 'The Chubs I'm referring to is David Moore', you just said Chubs, is that correct?

A The conversation was strictly around the name Chubs.

Q And when you stopped Mr. Moore, he was the [14] only person in the car, is that right?

A He was the only human being in the car. There was an animal in the car as well.

MS. SPRINKLE: I don't have any further questions, Judge.

THE COURT: Were you and Detective McAndrew together in the same vehicle?

THE WITNESS: No, we were in two separate vehicles.

THE COURT: And this was during the regular course of your work day?

THE WITNESS: Yes.

THE COURT: And what was the animal that was in the car?

THE WITNESS: It was a dog. I'm not sure if it was a Pit Bull; I'm not real good with dogs. It was big enough and loud enough that I didn't want to get too close to it. We actually had Animal Control come out and respond to retrieve the animal from the vehicle.

THE COURT: Were you aware or did you know this other gentleman that Detective Karpowski mentioned, Christopher Delbridge?

THE WITNESS: I know of him.

THE COURT: At the time, did you [15] know of him?

THE WITNESS: I knew of him but I was not aware that he also had the nickname of Chubs. The only person I've been familiar with associated with the name is David Lee More [sic].

THE COURT: So you had prior involvement with Mr. Moore?

THE WITNESS: I think we've had contact. I've never arrested him but through a series of interviews with other people we've arrested, his name has frequently come up and he's been referred to as Chubs. That's how we knew his nickname.

THE COURT: Is the nickname in some kind of documentation that you all keep?

THE WITNESS: I don't know if it's in any that I have on file. I know I've both casually and formally talked to people and his name has come up. His name has also come up with ATF and specifically with Task Force Agent Darryl Logwood. I mean we've known Mr. Moore for many, many years, probably going back seven or eight years when him and people he's been associated with used to live in Cradock, so at least for seven years we've associated that [16] nickname with him.

THE COURT: What division of the police department, if you know, is Detective Karpowski connected with?

THE WITNESS: He's in the same unit I am which is the Special Investigations Unit which primarily deals with narcotics.

THE COURT: Okay. Counsel, have I raised anything for you?

MS. CHUDZINSKI: No, sir.

THE COURT: All right. Miss Sprinkle?

MS. SPRINKLE: Judge, you haven't raised any questions for me.

THE COURT: Okay. Detective Anthony, you can have a seat back.

(Witness excused.)

THE COURT: All right, Miss Chudzinski.

MS. CHUDZINSKI: Judge, based on the evidence, I would ask you to suppress the narcotics in this case which were gotten as a result of the arrest. I don't think that there has been sufficient evidence to show that an arrest was necessary in this case. This was a traffic stop. And I understand if Detective Anthony was acting [17] on information that he thought it was proper to stop this vehicle, I understand that, but once he determined that –

THE COURT: It was a good faith exception in that situation; you would agree to that?

MS. CHUDZINSKI: Yes, I would agree to that. He was acting in good faith; he thought that he was pulling over the proper person. I don't question that. However, once he determined that this person's license was suspended, Detective Karpowski said he radioed that was not the person he was referring to. However, I understand this is a proper traffic stop, this person's license is suspended, but I think that in this case a summons should have been issued and he should have been released.

I don't think there's been evidence to show that it was proper for him to arrest Mr. Moore so, because the arrest was not proper, I would ask you to suppress any evidence obtained therefrom.

THE COURT: Okay. Is there any particular case that you wish to call my attention to?

MS. CHUDZINSKI: No, sir. I just think [18] that in this situation I don't think any

circumstances, any unusual circumstances were cited, other than a barking dog, that would indicate that Mr. Moore would need to be placed under arrest for a suspended license.

THE COURT: Okay. Miss Sprinkle?

MS. SPRINKLE: Judge, I think it's appropriate that they arrest him for the suspended license. It's a Class One misdemeanor. They've stated that he was the only person in the car, driving the car. Therefore, there's nobody else that could have driven the car or anything like that so he, then, therefore, would have had to have driven the car away, and a reason to arrest them is if you don't think they're going to discontinue the activity for which you're placing them under arrest. I think it's proper that they made the arrest for the suspended license. I ask you deny the motion.

THE COURT: All right. It appears that Virginia follows the rule that warrantless misdemeanor arrests are invalid unless the misdemeanor was committed in the arresting officer's presence.

In this case, the testimony was that he [19] was pulled and he was driving on a suspended license.

An offense is committed in the arresting officer's presence, according to the Supreme Court of Virginia, when he has direct personal knowledge through his sight, hearing and other senses that it is then and

there being committed. That's Galliher versus Commonwealth, 161 VA 1014, a 1933 case.

Furthermore, the Virginia or – excuse me – the United States Supreme Court held last year – excuse me – 2001, in the case of Atwater versus City of Lago Vista, 532 U.S. 318, that, "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the defendant." So I'm going to deny the motion to suppress.

Okay. Thank you, Miss Chudzinski.

MS. SPRINKLE: Thank you, judge.

THE COURT: All right. I'll be happy to hear from you all, hear your evidence.

MS. CHUDZINSKI: I guess at this point I have a motion to separate witnesses.

[20] THE COURT: All right. Anyone who's going to testify, please step into the hallway or into the witness room.

MS. CHUDZINSKI: Judge, I won't need to call Detective Karpowski any further. I don't know if –

MS. SPRINKLE: I don't believe I need to, Judge.

THE COURT: All right, We have an understanding that the testimony that was presented will be incorporated into the trial?

MS. CHUDZINSKI: Yes, sir.

THE COURT: Thank you, Detective. Please don't discuss your testimony.

MS. SPRINKLE: Call Detective McAndrew.

(Whereupon, the witness was sworn.)

DETECTIVE T. McANDREW, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SPRINKLE:

[21] Q Good morning. Can you please state your name and occupation for the Court?

A Detective T. McAndrew, Portsmouth Police, Special Investigations Unit.

Q Sir, were you so employed in that capacity February 20 of this year?

A Yes, ma'am.

Q On that date did you come in contact with a David L. Moore?

A Yes, ma'am, the gentleman in the green jail outfit next to defense counsel.

MS. SPRINKLE: Thank you. Judge, can the record reflect he's identified the defendant, please?

THE COURT: It will reflect.

MS. SPRINKLE: Thank you.

BY MS. SPRINKLE:

Q Detective McAndrew, where did you come in contact with the defendant?

A It was in the 2000 block of Airline Boulevard in the City of Portsmouth. I was assisting Detective Anthony on a traffic stop where Mr. Moore was driving the vehicle.

Q And did you all pull over that vehicle?

[22] A Yes, we did.

Q And why was that?

A Due to the fact that Mr. Moore had a suspended license.

Q And what happened when you pulled the vehicle over?

A Stopped the vehicle, Detective Anthony had contact with Mr. Moore and based on his contact with him, their conversation, Mr. Moore was taken to the City of Chesapeake to a hotel room there.

Q Did you ever check to see if Mr. Moore's license was suspended?

A Personally, I did not. Detective Anthony ran his license that day.

Q Was Mr. Moore placed under arrest?

A Yes.

Q Okay. At some point, was Mr. Moore searched after the arrest?

A Yes. I searched him at the Econo-Lodge in the City of Chesapeake. He was wearing a tan jacket, was like a leather-type jacket, and inside the right front pocket I recovered one clear plastic baggie containing approximately sixteen grams of suspected crack cocaine. I do have that item.

MS. SPRINKLE: Judge, may I approach?

[23] THE COURT: You may.

BY MS. SPRINKLE:

Q Showing you this item, is this the item that you referred to?

A Yes, that is the suspected crack cocaine that I recovered out of his right front pocket of the tan jacket he was wearing.

Q What did you do with it after you recovered it?

A I kept it in my sole care and custody. I transported it to headquarters where I packaged it and placed it in the red mailbox in Property and Evidence.

Q Was that in proper working order on that day?

A Yes, it was.

Q Does this appear to be in the same condition as it was when you packaged it, besides the yellow tape?

A Yes.

Q Does it have your initials on it?

A Yes, at the top.

(Whereupon, Ms. Sprinkle displayed item to the defense.)

MS. SPRINKLE: Judge, I move to introduce this just for identification purposes [24] as Commonwealth's 1.

THE COURT: All right. It will be marked Commonwealth's Number 1.

BY MS. SPRINKLE:

Q Sir, did you recover anything else from the defendant on that day?

A I also recovered five hundred and sixteen dollars U. S. currency from Mr. Moore's right front

pocket of the blue jeans he was wearing at the time he was taken into custody.

Q Showing you this item, do you recognize this?

A Yes, that's the U. S. currency, five hundred and sixteen dollars, that I recovered from Mr. Moore's right front pocket of the blue jeans he was wearing.

Q What did you do with the currency once you recovered it?

A I kept it in my sole care and custody. I transported it to headquarters, packaged it and placed it in the red mailbox in Property and Evidence.

(Whereupon, Ms. Sprinkle displayed item to the defense.)

BY MS. SPRINKLE:

Q Sir, does that appear to be in the same [25] condition as when you placed it in the mailbox?

A Yes.

Q What is this item?

A I did not put that on there. I believe Property and Evidence, Swan, may have put that on there.

Q Are these your initials?

A Yes.

MS. SPRINKLE: Judge, we move to introduce as Commonwealth's 2.

THE COURT: Any objection?

MS. CHUDZINSKI: Well, if I may ask him a couple of questions?

THE COURT: Yes, you may.

CROSS EXAMINATION

BY MS. CHUDZINSKI:

Q Was I correct when you said that these items you recovered when you were in Chesapeake?

A Yes.

Q Did you search Mr. Moore prior to taking him to Chesapeake?

A He was placed in my unmarked police vehicle by Detective Anthony and there was a miscommunication between myself and Detective Anthony. I was under the impression that he had already searched him prior to placing [26] him in my police vehicle.

MS. CHUDZINSKI: Okay. May I approach the witness?

THE COURT: You may.

BY MS. CHUDZINSKI:

Q On both of these items that you just described, where does it say location of recovery?

A Where? It says Airline Boulevard and Winchester Street, but that was where the initial traffic stop was done. I put that there to show that he was stopped at that intersection initially.

Q So these were not recovered there?

A But it also says, if you look, where it was recovered on his person, recovered out of suspect's right front pocket of the tan jacket, and the other one says recovered out of suspect's right front pocket of the blue jeans that he was wearing.

Q Okay. Well, if there was miscommunication about whether he was searched or not, how many – How many detectives or police officers were involved in this arrest and search?

A It was myself, Anthony, Detective Karpowski, I want to say Detective Lewis responded to the scene.

Q Anyone else?

[27] A Not that I recall.

Q How many people actually had contact with Mr. Moore? Was it all four or –

A Initially, Detective Anthony came in contact with him on the driver's side of the vehicle, and I believe he had a Pit Bull inside the vehicle that we had to call for Animal Control to get out of the vehicle prior to taking him out of the vehicle because the dog was very upset with us being there, and Detective Anthony spoke to him the whole time we were on scene.

THE COURT: Spoke to the dog or to Mr. Moore?

THE WITNESS: Mr. Moore; I'm sorry.

BY MS. CHUDZINSKI:

Q Were there periods of time when Mr. Moore wasn't in anyone's custody?

A What do you mean? I don't understand.

Q Well, you said at one point he was –

A He was never left alone.

Q Okay. So he was never searched prior to you going to Chesapeake?

A Like I said, there was a miscommunication between myself and Detective Anthony. I was under the impression that he searched him prior to placing him in my [28] police vehicle. When we were in Chesapeake, prior to me putting him back in my vehicle, I searched him and that's when I discovered them items.

Q And where, exactly, were these items?

A The suspected crack cocaine was located in the right front pocket of the tan jacket that Mr. Moore was wearing, and the five hundred and sixteen dollars in U. S. Currency was recovered in Mr. Moore's right front pocket of the blue jeans that he was wearing at the time he was taken into custody.

Q Was he wearing the jacket the entire time from when you stopped him until you searched him?

A Yes.

Q Did he tell you where the money came from?

A I didn't interview him at all. I was the evidence person. Basically, I took custody of all the evidence from him as well as at the hotel room.

Q So he made no statement to you at all?

A Not to me.

MS. CHUDZINSKI: No further questions.

THE COURT: Okay. We still have the five hundred sixteen dollars moved into evidence, Miss Sprinkle, and I think you were – You objected –

MS. CHUDZINSKI: Well, I –

[29] THE COURT: – said you wanted to ask some questions.

MS. CHUDZINSKI: Well, actually, I don't think she moved either one in; I think it was just for identification purposes.

THE COURT: She said she was moving the second for admission. Maybe I misread her. I will allow Miss Sprinkle to speak for herself.

MS. SPRINKLE: Judge, I was going to introduce the money.

THE COURT: Okay. You have moved to introduce the money. Is there any objection to the money coming into evidence?

MS. CHUDZINSKI: No, sir.

THE COURT: All right. It will be marked and admitted as Commonwealth's Number 2.

MS. SPRINKLE: Thank you, Judge.

THE COURT: Number 1 has just been marked for identification purposes.

MS. SPRINKLE: That's correct, Judge. Judge, I still had some questions –

THE COURT: All right. Go ahead, Miss Sprinkle.

DIRECT EXAMINATION (Cont'd)

[30] BY MS. SPRINKLE:

Q Detective, you said that he was never left alone once he was arrested, is that correct?

A That's correct.

Q Were you – Could you see him the whole time you were there?

A Anthony had him in the right front passenger seat of my vehicle, was talking to him, and when we left the scene, I drove my vehicle and he was in the right front passenger seat.

Q Did you ever see him change the clothes that he had on from the time you arrested him?

A No, ma'am.

Q Did you ever see anybody place anything into his clothes?

A No, ma'am.

Q And he was wearing the items of clothing in Portsmouth when you stopped him?

A Yes, ma'am.

Q And after you all were finished in Chesapeake, is that the only contact you had with David Moore after that?

A He was brought to our office and was interviewed by Detective Anthony, and I believe Detective Logwood from the ATF came there.

Q And all the events you testified to occurred [31] in the City of Portsmouth with the exception of when you went to Chesapeake?

A Yes, ma'am.

MS. SPRINKLE: Please answer any questions of Miss Chudzinski.

MS. CHUDZINSKI: I don't have any further questions.

THE COURT: Detective McAndrew, so when he was arrested, he was placed in the right front passenger seat of your vehicle?

THE WITNESS: Yes, sir.

THE COURT: And Detective Anthony then questioned him while he was sitting there?

THE WITNESS: Yes, sir.

THE COURT: Then you entered the vehicle. The defendant remained in the right front passenger seat when you got into the vehicle?

THE WITNESS: Yes, sir.

THE COURT: And then you drove him to Chesapeake?

THE WITNESS: Yes, sir.

THE COURT: And then you searched him at that point?

THE WITNESS: At the hotel room, yes, sir.

[32] THE COURT: So you walk around to the passenger door, unlock it, he gets out and you all walk into the hotel?

THE WITNESS: He took us to a hotel room. I believe it was the Econo-Lodge on Military Highway by Frank's Truck Stop, and he was with us the whole time; he was never left alone.

THE COURT: At what point did you realize he had not been searched?

THE WITNESS: It was –

THE COURT: Before you got to the hotel?

THE WITNESS: No, sir, it was while we were at the hotel I searched him.

THE COURT: Had he been patted down before he got into your car?

THE WITNESS: That I don't know. Like I said, Anthony had contact with him on the driver's side, actually had him get out of the vehicle. As far as searching him, I don't know what he did, to be honest with you.

THE COURT: All right. And upon entering the hotel room, at what point did you search him?

THE WITNESS: While we were in the [33] room.

THE COURT: Was it the first thing you did, second thing you did?

THE WITNESS: I did – We did a protective sweep of the hotel room to make sure nobody else was in there hiding in the bathroom or anything. Then I searched him after that and when I was finished searching him and recovering those items, we searched the hotel room.

THE COURT: So nobody was there when you arrived?

THE WITNESS: No, sir.

THE COURT: Did he represent to you this was his hotel room?

THE WITNESS: He was talking to Anthony the whole time. Like I said, he brought us to that hotel room.

THE COURT: Okay. Did I raise any questions for you all, Counsel?

MS. SPRINKLE: Judge, just briefly – You were – He was in your sight the entire time at the hotel?

THE WITNESS: Yes, ma'am.

MS. SPRINKLE: Was he in handcuffs at that time?

[34] THE WITNESS: Yes.

MS. SPRINKLE: And you or Detective Anthony never placed anything on his person?

THE WITNESS: No.

MS. SPRINKLE: Nothing further, Judge.

CROSS EXAMINATION

BY MS. CHUDZINSKI:

Q So as far as you know, you were the only person that searched him?

A I searched him, yes.

Q Did anybody else assist you in searching him?

A No

MS. CHUDZINSKI: No further questions.

THE COURT: Okay. Thank you, Detective McAndrew. May he go or do you want him to remain?

MS. SPRINKLE: I think I need to hold him, Judge.

THE COURT: All right. Thank you.

(Witness excused.)

MS. SPRINKLE: Detective Anthony.

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[35] *DETECTIVE MARK ANTHONY*, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SPRINKLE:

Q Good morning. Can you please state your name and occupation for the Court?

A Detective Mark Anthony, Portsmouth Police.

Q Sir, were you so employed in that capacity on February 20 of this year?

A Yes.

Q On that date, did you come in contact with a David L. Moore?

A Yes, I did, the individual in the green jumpsuit next to defense counsel.

MS. SPRINKLE: Judge, if the record can reflect he's identified the defendant.

THE COURT: It will reflect.

MS. SPRINKLE: Thank you, Judge.

BY MS. SPRINKLE:

Q Sir, where did you come in contact with him on that day?

A It was approximately the 2000 block of [36] Airline Boulevard was the initial sighting of him and we eventually stopped him approximately the 1700 block of Airline Boulevard in the City of Portsmouth.

Q And why did you stop him?

A Based on information that I received from Detective Karpowski that Mr. Moore's, who I know as Chubs, license was suspended.

Q And when you stopped him, were you able to verify whether or not his license was, indeed, suspended?

A Yes, I was, and yes, it was.

Q What did you do once you found out that his license was suspended?

A Well, we effected an arrest and pursuant to that conducted a narcotics investigation.

Q What happened after you placed him under arrest?

A Well, I talked to him briefly – I advised him of his Miranda rights. I did that approximately fifteen minutes after we had him stopped, approximately three fifteen. I asked him if he understood his rights; he acknowledged that he did. We talked to him about whether or not he was in possession of narcotics. We asked him where he was staying. He stated he was staying in a hotel in Chesapeake.

THE COURT: Is there an objection?

[37] MS. CHUDZINSKI: Judge, may I briefly ask him a couple of questions about the Miranda?

MS. SPRINKLE: That's fine.

THE COURT: Okay.

CROSS EXAMINATION

BY MS. CHUDZINSKI:

Q Detective, can you describe – What Miranda rights did you read to him?

A Well, I'll verbally state to you what I verbally stated to him as I do all the time. I don't use a card. I stated this: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, the Court will consider appointing an attorney for you. Do you understand your rights?" And he replied, "Yes."

Q And that was his only reply, then, that he understood them?

A In terms of acknowledgment, yes.

Q Okay. Then you proceeded to question him?

A Yes.

Q Did you ask him if he waived his Miranda rights?

A No.

[38] Q And he made a statement to you?

A Well, just in response to questions.

MS. CHUDZINSKI: Judge, I would ask you not to consider any of the statement based on the fact that we don't have a waiver of Miranda.

MS. SPRINKLE: Judge, I have had this come up before and they don't have to ask that last question, "Do you waive these rights?" They've been told, "Anything you say can and will be used against you, You have the right to remain silent." They continue to question him, he continues to talk. I don't think you have to have that last question of, "Do you waive your rights?"

You have to consider whether or not it was voluntary. There's no evidence there was any force or intimidation, coercion, anything of that nature.

THE COURT: All right. Let's see what Professor Bacigal has to say about this.

"In the absence – " He says, "In the absence of an explicit waiver, a waiver can in some cases or circumstances be inferred from the actions and words of the person interrogated." He cites the U. S. Supreme Court case of North [39] Carolina versus Butler, 441 U.S. 369, a 1979 opinion. "In North Carolina versus Butler, the defendant refused to sign a waiver form but did agree to talk. Examining particular facts and circumstances, the Supreme Court found that a valid waiver had occurred."

In the case of Smith versus Commonwealth, Virginia Court of Appeals case, 7 Va. App. 310, 1988, the defendant was asked whether he wished to make

a statement. He responded, "No, sir." The police officer then asked, "Do you want to tell me what happened this evening prior to the time I placed you under arrest?" In view of the defendant's prior admissions, the police officer's question was deemed to be one of clarification and defendant's subsequent statement was voluntary and made pursuant to a valid waiver of his privilege against self-incrimination.

So in this case the testimony is that the rights were given, there was no question 'Do you waive' or 'You don't waive', they proceeded to question him after giving the rights.

Why is that different, Miss Chudzinski, from the North Carolina Butler situation where the defendant refuses to sign a waiver but then agrees [40] to talk? And I know you haven't read the case. I'm not trying to be difficult with you. I'm just asking you if you wish to comment on that, why, if you have any response.

MS. CHUDZINSKI: Well, what I think is different is that in that situation he was actually asked, you know. He didn't want to sign the waiver but he did agree to talk, and I don't think we have any evidence of that. All we have is he indicated 'Yes, I understand', but he wasn't asked, "Do you want to make a statement? Do you want to talk to me? Do you want to answer my questions?" There wasn't anything like that. They just started questioning him,

and I don't think there was an effective waiver or that there's evidence of that.

And I guess just further, there was no form. We don't have any evidence that he was given a form like sometimes we'll see where there's a form with Miranda rights written and sometimes they'll initial that they understood each right. No notes were taken, nothing was written, nothing was presented to him like that.

THE COURT: Okay.

MS. SPRINKLE: Judge, just to that point, there's nothing requiring them to give a [41] form, for them to sign a form. We have Detective Anthony's testimony that he read him his Miranda rights, he's told you what rights he said and he also indicated that he said did he understand them and he said he understood them. There's nothing requiring them to have him sign something saying he acknowledges his rights.

THE COURT: I think this is similar to the Supreme Court situation in North Carolina versus Butler. The fact that you're presented with a form and then you refuse to sign it but then you talk, I don't find that to be significantly different from the situation where you're read your rights, you're told you have the right to remain silent and then a question is asked and you respond. I think that's an implicit waiver.

Now, the situation is obviously different where someone says 'I'm not going to talk; I don't want to say anything', and then you continue to question him. There is no testimony here that anything like that happened, so I'm going to allow the testimony.

MS. SPRINKLE: Thank you, Judge.

DIRECT EXAMINATION (Cont'd)

[42] BY MS. SPRINKLE:

Q Detective Anthony, you talked to him about where he was staying; at some point you all then went to Chesapeake, is that correct?

A Yes, we went to, I think it's the Econo-Lodge in Chesapeake off of Military Highway.

Q Did you search the defendant prior to going there?

A No.

Q Now, while you all were at the traffic stop, did you stay in contact with the defendant the whole time you all were there?

A I had visual on him. Initially, I removed Mr. Moore from the vehicle and I think it was me who actually placed handcuffs on him and I initially engaged him in conversation, and at some point prior to going over to Chesapeake, though, he was walked over to Detective McAndrew's vehicle and it was there at Detective McAndrew's vehicle that he signed

a waiver of consent allowing us to go to his hotel room and McAndrew drove him to the Econo-Lodge with me behind him, basically.

Q While you all were at the location of the traffic stop, did you ever see anyone else have any contact with the defendant?

A No. There was no one else present. No one [43] else got close.

Q Was – From the time you stopped him in Portsmouth until the time he was searched in Chesapeake, was he wearing the same clothing?

A Yes.

Q Were you present when the defendant was searched?

A Yes.

Q And where did that occur?

A Inside the hotel room in Chesapeake.

Q Were you there – Did you see whether or not anything was recovered?

A I observed Detective McAndrew recover some crack cocaine from I think his coat pocket, but I don't remember which pocket it was.

Q And did you have any contact with those items?

A I don't think I did. I think he recovered that and continued to collect evidence in Chesapeake.

Q At some point was the defendant brought here, back to Portsmouth?

A Yes.

Q At the time that he was back here in Portsmouth, did he make any statements about the crack cocaine that was recovered?

A Yes.

[44] Q And what did you hear him state regarding the crack cocaine?

A The conversation took place while Darryl Logwood who, again, is the Portsmouth task force agent assigned to ATF, was conducting an interview with Mr. Moore with regard to some activities that he's associated with, and during the question and answer session, Mr. Moore admitted that the crack cocaine in his pocket was, in fact, his.

Q You were present during this interview?

A Yes.

Q You could hear these statements. And other than admitting that it was his, did he say anything else regarding the cocaine?

A Yes, he did. Mr. Moore talked about a gentleman that he has been, to use the street term, re-upping from which means getting his supply of

crack cocaine for distribution, and he said, if I can refer to my notes, approximately two to three times per week he purchased amounts from an eighth of an ounce to a quarter of an ounce from a man named Cedric Williams who lives over in Norport Apartments or Byrd Lane, that area over there, and the amount he purchased from Mr. Williams was intended for distribution and that Mr. Moore most of the time would simply drive around in his vehicle with these quantities [45] and, as people would call him on the phone, he would drive to locations and make deliveries.

Q Was that the end of your contact with him for that time?

A Mr. Moore was in the office quite a bit of time while we were conducting paperwork. There was other conversations ongoing but nothing substantive that I can recall.

Q Sir, when you were able to verify that he had a suspended license, do you have the DMV abstract with you?

A Yes.

MS. SPRINKLE: Your Honor, may I approach?

THE COURT: You may.

BY MS. SPRINKLE:

Q Did he ever make any statement about the license?

A He may have but I don't recollect what he may have said.

(Whereupon, Ms. Sprinkle displayed item to the defense.)

MS. SPRINKLE: Judge, move the abstract [46] as Commonwealth's Number 3.

THE COURT: Any objection?

MS. CHUDZINSKI: No, sir.

THE COURT: The DMV abstract will be marked – You're offering it for admission?

MS. SPRINKLE: That's correct.

THE COURT: – for admission as Commonwealth's Number 3.

BY MS. SPRINKLE:

Q Sir, did you also get all his pedigree information from him?

A One of us did; I don't remember who it was but – I don't remember. We did but I don't recall who did it.

Q Okay. Did all the events you testified to occur in the City of Portsmouth?

A Some of them did and some occurred in Chesapeake.

Q Besides what we've already talked about in Chesapeake?

A Yes.

MS. SPRINKLE: Please answer any questions Miss Chudzinski has.

[47] CROSS EXAMINATION

BY MS. CHUDZINSKI:

Q When he gave his statements at headquarters, did anybody record them?

A Well, first of all, it wasn't at headquarters, it was at our office at 601 Effingham Street.

Q I'm sorry. Did you record his statement?

A No.

Q You didn't have him write anything?

A I wasn't interviewing him in the office, Darryl Logwood was. I was participating in the interview, basically monitoring it, and I was coming in and out of the room.

Q So there were parts of the statement that you didn't even hear?

A That would be correct.

Q Who else was in the room besides Detective Logwood?

A There were a number of other police officers present. I couldn't tell you who else went into the room.

Q Because you were in and out, back and forth?

A Yes.

Q Okay. Going back earlier, going back to the traffic stop, you said that you did not search him prior to Detective McAndrew's searching him?

[48] A That's correct.

Q How many different people had Mr. Moore in custody?

A I think just me and McAndrew.

Q Did anybody else have access to him?

A I believe someone was riding with McAndrew but I don't recall who.

Q Okay. How many detectives were out there that day, or police officers?

A Well, there was certainly myself, McAndrew, Karpowski was in the area but I don't think he participated in the traffic stop; I think he drove by later, I understood. And there was somebody else with McAndrew, I believe, but I don't remember who that was.

Q Do you know if anybody else searched him besides Detective McAndrew?

A Not in my presence.

Q Do you know if anybody removed a watch from Mr. Moore at any point?

A I don't know.

Q Did Mr. Moore tell you where he was going that day?

A He may have but I don't remember. It was nothing that rung a bell or nothing that I took down.

MS. CHUDZINSKI: Okay. No further [49] questions.

MS. SPRINKLE: I just have one brief one, Judge.

REDIRECT EXAMINATION

BY MS. SPRINKLE:

Q When he was at the traffic stop in Portsmouth, you said he was in your vision the time you were there?

A In my custody, yes. I was the one who pulled him out of the vehicle and I believe I handcuffed him and stood with him on the side of the road while the other officers tended to the vehicle and, ultimately, the animal.

Q So you never saw anybody place anything in his pockets or anything of that nature?

A No.

Q And you did not do that?

A That's correct, I did not do that.

MS. SPRINKLE: Nothing further, Judge.

THE COURT: Detective, you removed him from his vehicle?

THE WITNESS: Yes, sir.

THE COURT: Questioned him for fifteen minutes –

THE WITNESS: Well, we were there fifteen minutes and during the course some [50] questions came out.

THE COURT: And you said fifteen minutes after the stop you Mirandized him?

THE WITNESS: Approximately.

THE COURT: Then you stood with him on the side of the road?

THE WITNESS: Yes. We were there for quite a period because we had to wait for Animal Control to get there and recover the dog. I'm guesstimating forty-five minutes to an hour from the time we initiated the stop until we left to go to Chesapeake.

THE COURT: And what did you do with the defendant during this forty-five minutes?

THE WITNESS: Mr. Moore was in handcuffs the entire time.

THE COURT: Was he handcuffed behind his back?

THE WITNESS: Yes, he was.

THE COURT: And did there come a time when you put him in a vehicle?

THE WITNESS: Ultimately, he was placed in Detective McAndrew's vehicle.

THE COURT: And who placed him there?

THE WITNESS: I think we kind of all [51] walked over that way. I got involved in conversation with someone else there and we walked over that way and at some point Mr. Moore then signed a consent form, and I recall using McAndrew's vehicle as a surface to write on, so I think we had to un-handcuff him briefly at some point so he could sign the form. He was placed back in handcuffs and we went to Chesapeake.

THE COURT: He had already been Mirandized at the time he signed the form?

THE WITNESS: Yes.

THE COURT: And then he was placed in McAndrew's vehicle?

THE WITNESS: Yes. I don't know who made the decision but that's the vehicle he went in.

THE COURT: Where was he placed, in the front or the back of the vehicle?

THE WITNESS: I don't recall, Judge, but normally it would be the front seat of the car. If there

was someone else with McAndrew – Unfortunately, I can't remember, but what we usually do is have him sit in the front seat of the car so the person behind can watch him.

THE COURT: So if there is a third [52] person, normally he's seated in the front seat. If there is no third person, would you normally seat him in the back seat?

THE WITNESS: Probably the only time – Our vehicles which are called soft cars or funny cars – It's not a regular patrol vehicle, obviously. In this case it was a Chevrolet Blazer. Probably the only time he would be seated in the back seat is if there was three other police officers, including the driver. In most other circumstances, whether it be just the police officer who's driving the vehicle and one or two other police officers, he's going to be sitting in the seat up front because that's the point we can have the most visual contact with him, make sure he's not doing anything he's not supposed to be doing.

THE COURT: So there's no barrier between the front seat and back seat the way there is in a marked police car?

THE WITNESS: Correct.

THE COURT: Then did you follow Detective McAndrew and the defendant in his vehicle to the Chesapeake hotel, motel?

THE WITNESS: I believe the defendant's [53] vehicle did not go with us –

THE COURT: No, I mean the defendant himself was in McAndrew's vehicle –

THE WITNESS: Yes.

THE COURT: Did you follow them?

THE WITNESS: Correct.

THE COURT: And then when you went into the Econo-Travel or Lodge in Chesapeake, did you all at some point realize that there had been no search?

THE WITNESS: Yeah, we had a mis-commnication. It probably stemmed from when I removed Mr. Moore from the vehicle, I didn't pat him down because during the course of the stop Mr. Moore was making a motion with his hands toward the floor, floorboard of the car, and based on my training and experience, a lot of people who are involved in criminal enterprises keep weapons there, so I removed him out of the vehicle, placed him in handcuffs and proceeded to do other things and I guess during the course of that time, because we waited so long, I think we both assumed that each other had searched him when, in fact, neither one of us had.

THE COURT: Neither one of you [54] patted him down?

THE WITNESS: I patted him down at the initial stop but that was just exterior clothing. I didn't feel anything I was concerned about immediately

then so I didn't proceed further with it. I was just searching for weapons. When I say searching, patting him down. I didn't go in his pockets or anything like that.

THE COURT: All right. Counsel, have I raised any questions for you all?

MS. SPRINKLE: No, sir, Judge.

MS. CHUDZINSKI: No, sir.

THE COURT: Thank you, Detective. Do you want him to stay?

MS. SPRINKLE: Yes, Judge, please.

THE COURT: All right.

(Witness excused.)

MS. SPRINKLE: Call Officer Swan.

(Whereupon, the witness was sworn.)

OFFICER J. R. SWAN, called as a witness on behalf of the Commonwealth, having been first duly

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